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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

October Term, 1953.
No. 474

R. B. COLBERT, E. J. BARRET, JOHN A. GROSS, J. J. CASSIDY, FRANK W. STURM, GROVER C. SHIDELER, F. V. MALONE, R. E. CARTER, M. L. PATRICK, MELVIN L. OGAN, JOHN T. TAYLOR, S. T. PRITCHARD, J. M. LEWIS and K. L. GARST,

Petitioners,

vs.

BROTHERHOOD OF RAILROAD TRAINMEN, BROTHERHOOD OF RAILROAD TRAINMEN, LODGE NO. 448, LODGE NO. 912, LODGE NO. 22, PACIFIC ELECTRIC RAILWAY COMPANY, BROTHERHOOD OF RAILROAD TRAINMEN, GENERAL GRIEVANCE COMMITTEE, PACIFIC ELECTRIC LINES,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and Brief in Support Thereof.

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Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Chief Justice and the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioners above named respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Court to review the decision of the United States

Court of Appeals for the Ninth Circuit which affirmed a judgment of the United States District Court for the Southern District of California, Central Division, in favor of respondents and against petitioners.

The petitioners who were the plaintiffs in the District Court and appellants in the Court of Appeals for the Ninth Circuit will sometimes be referred to herein as plaintiffs or appellants, and the respondents will sometimes be referred to as defendants or appellees. Respondent Brotherhoods will sometimes be referred to as B. R. T. and respondent Pacific Electric Railway Company as P. E.

Opinions Below.

The opinion of the Court of Appeals is printed in the record [R. 62-73] and is reported at 206 F. 2d 9. The trial court did not render any opinion either formal or informal.

Jurisdiction.

Jurisdiction to review the instant case on a Writ of Certiorari is conferred upon this Court by Title 28 U. S. C. Section 1254(1).

The judgment of the Court of Appeals was entered July 13, 1953 [R. 74]. A petition for rehearing, timely filed, was denied on September 14, 1953 [R. 74]. An Order has been made by that Court staying the mandate until November 19, 1953 pending the filing of this petition for certiorari.

Summary Statement of the Matter Involved.

This was an action brought by some fourteen employees of Pacific Electric Railway, both on their individual behalf and on behalf of numerous other persons similarly situated, to protect their right to work, which they asserted had been seriously impaired by contracts entered into by defendant, Pacific Electric Railway Company, and the defendant, Brotherhood of Railroad Trainmen, and its local lodges and grievance committee.

The complaint alleged that the B. R. T. had asserted and asserts the right to act as the exclusive bargaining representative of the Motormen, Conductors, Brakemen, Locomotive Engineers and other personnel employed by Pacific Electric [R. 5]; that as such bargaining agent it had entered into agreements containing invalid provisions.

The complaint revealed that the following situation obtained on the property of the Pacific Electric:

Prior to December 22, 1942, seniority rights of employees were confined to districts on the P. E. System and to the craft and class in which the man was employed. Seniority rights were not comprehensive to cover the entire service and include all classes and crafts [R. 7, 8]. For example, locomotive engineers acquired seniority as locomotive engineers, and brakemen acquired seniority as brakemen [R. 8]. It was and is a standard rule on all railroads (except P. E.) that seniority be acquired in a class or craft and not on a system-wide all-inclusive basis [R. 8]. That is to say, seniority was based on a "date of qualification" concept.

However, on December 22, 1942, the bargaining agent entered into a new agreement with the management,

which provided, among other things, for a system of seniority known as "merged system seniority" [R. 10]. The date of August 6, 1941, was arbitrarily selected as the dividing date, and all men employed prior to that date were given what might be termed "dual" seniority, but all men employed subsequent to that date were given only the "merged" seniority [R. 6, 7, 8].

As among themselves, men hired prior to August 6, 1941, retained seniority in the class and craft in the District in which they happened to acquire the same and were also given so-called "merged" seniority after that date.[1] Men who had qualified as brakemen, as engineers, as firemen, etc. and were employed prior to August 6, 1941, held seniority dates in these job classifications as of the actual date on which they qualified for the various jobs. However, as to men employed subsequent to August 6, 1941, these older employees could step in and take their jobs, even though they qualified after the employee hired after August 6, 1941 [R. 12].

For example, a qualified man who obtained employment as a steam locomotive engineer on August 7, 1941, would be required by virtue of his employment to train other employees, working as firemen, to become steam locomotive engineers. If such a trainee had been employed by the company in any capacity before August 6, 1941, he would be entitled to take over the job of the man training him as soon as he became qualified to handle the job. Upon qualification, the pupil would replace the master [R. 12].

---

[1]The instigators of the "merged" system thus regard it as utterly undesirable and, as among themselves, are still governed by the "date of qualification" basis. See Section 2(b) of Article 36 of the questioned agreement. [R. 6, 7, 27, 28.]

The situation above described came about as explained by the complaint, because of the knowledge of the majority of the employees that after the war, many of the facilities operated by the P. E. would be abandoned and because they realized that large numbers of men, many of them qualified railroad workers, were being taken on "because of war emergency conditions requiring expanded use of facilities" [R. 9]. It was the intention of these older employees "arbitrarily to place themselves and other older members in a privileged category even at the expense of men already in the service of the P. E. and in violation of the Constitution of the general B. R. T. organization" [R. 9, 10].

The obvious disregard for the rights acquired by men who entered the service between the 6th of August, 1941, and before the 22nd day of December, 1942, was pointed out in the complaint [R. 10].

The agreement in question also violated several provisions of the Constitution of the Brotherhood [R. 10, 11, 12].

It was shown that the changes whereby "merged seniority" was set up were not submitted to a referendum of the B. R. T. members on the property in question, as required in Rule 3 of the "Protective Department" of the Constitution, which provides that the General Grievance Committee shall not negotiate an agreement involving change of "recognized home and other terminals in either pool or assigned freight or passenger service or the reassignment of crews in connection therewith without first securing the consent of the majority of the members who hold seniority rights and are paying grievance committee assessments on each seniority district,

division or subdivision affected by a referendum vote in the manner as provided for herein" [R. 10, 11].

The agreement in question of course had the effect of accomplishing such a change, inasmuch as it terminated the system of acquiring seniority only in districts and provided for the acquisition of seniority over the entire system without regard to districts. Furthermore, although it preserved seniority within the districts as to men employed before August 6, 1941, the rights of men employed after that date and before the agreement was entered into were destroyed.

The complaint further pointed out that the system of "merged seniority" violated another provision of the aforementioned Rule 3 of the "Protective Department" of the Constitution of the Brotherhood which provided, "a standard rule will not be altered or amended without the permission of the President of the Brotherhood" and which declared that yard work and road work are two separate and distinct classes of service and that the President of the Brotherhood and the other officials "are hereby obliged and instructed to maintain a definite and defined line of demarcation between such yard and road service to the end that employees of one class of service shall not encroach upon the rights of employees of the other class of service." In this connection it was averred that the President of the Brotherhood had not authorized the committee to make the change in the agreement in respect of "merged seniority" [R. 11, 12]. The agreement complained of made no distinction between yard and road service.

The predicament of the plaintiffs and other similarly situated, because of this discriminatory agreement, was

pointed out in allegations to the effect that the demand for employees in street car service of the P. E. has steadily declined and many positions have been abolished. Men in street car service with seniority dates prior to August 6, 1941, had been displacing men in freight service after a short qualification period and "in a matter of a few weeks, many of the plaintiffs will be in a position where no work will be available to them on the lines of the P. E. unless older employees of said P. E. who are presently not qualified on the jobs held by plaintiffs, are restrained from attempting to oust plaintiffs from their jobs because of the alleged rights of the older members under the merged seniority system" [R. 12, 13].

The complaint further averred that the plaintiffs had no adequate remedy at law and no adequate remedy before any administrative tribunal, such as the National Railway Adjustment Board [R. 13, 14, 15]. The court was requested to declare that the provisions of the agreement pertaining to "merged seniority" were invalid and void and to enjoin the defendants from enforcing or attempting to enforce said provisions in any manner [R. 16].

The Decision of the District Court.

Respondents moved in the District Court that the complaint be dismissed and after having the matter under submission for some two and a half months, the District Court, without opinion, granted the motions and entered an Order Dismissing the complaint [R. 49-52].

The Decision of the Court of Appeals.

The Court of Appeals held that the decision of the District Court dismissing the proceedings was correct since petitioners were afforded a hearing before the National Railway Adjustment Board, which the Court averred had jurisdiction "to make findings and enter awards in all disputes between carriers and their employees growing out of grievances of the kind alleged in the complaint or out of the interpretation or application of agreements relative to working conditions in which category any railway public service seniority is of course included" [R. 70].

Reasons Relied Upon for Issuance of Writ of Certiorari.

I.

The decision of the Court of Appeals is in conflict with decisions of the Supreme Court of the United States with respect to the scope and effect of the Railway Labor Act. If such decision is permitted to stand, it may result in future inequities and injustices to railway workers throughout the United States and impede commerce among the states.

II.

The decision of the Court of Appeals will result in a further marasmus of judicial processes and an unwarranted and unhealthy insufflation of the powers of administrative tribunals.

Exposition of Reasons for Issuance of Writ.

The decision of the Court of Appeals conflicts with the decisions of the Supreme Court in the cases of *Steele v. Louisville & Nashville Ry. Co.* (1944), 323 U. S. 192, 89 L. Ed. 173; *Tunstall v. Brotherhood of Locomotive Firemen and Engineers* (1944), 323 U. S. 210, 89 L. Ed. 187; *Brotherhood of Railroad Trainmen v. Howard* (1952), 343 U. S. 768, 96 L. Ed. 1283.

The line of distinction between these cases cited in the preceding paragraph and the cases of *Order of Railway Conductors v. Pitney* (1946), 326 U. S. 561, 90 L. Ed. 318 and *Slocum v. Delaware etc. Ry.* (1950), 339 U. S. 239, 94 L. Ed. 795, we believe, will be apparent from the discussion which follows in this petition.

Petitioners further believe that the proposition with regard to administrative tribunals need not be amplified in this portion of the petition since it will be apparent from the discussion which follows.

Questions Presented.

Question No. 1: Where a bargaining representative of an interstate railway carrier enters into an agreement, purportedly in accordance with the Railway Labor Act, do the Federal Courts have jurisdiction of an action brought against the bargaining agent and the carrier by a minority group of employees to establish the asserted invalidity of the contract?

Question No. 2: Does the National Railroad Adjustment Board have exclusive primary jurisdiction of a

controversy between railroad employees, on the one hand, and their bargaining representative and employer, on the other hand, concerning the validity of a collective bargaining agreement?

Question No. 3: Are seniority rights of railway workers wholly contractual and subject to destruction at the whim, caprice, or fraudulent action of the bargaining representative and management—if not, are the Federal Courts powerless to grant relief?

Conclusion.

For the foregoing reasons, and for the reasons set forth in the Brief in support of this Petition presented herewith, Petitioners pray that this Petition be granted and that the aforesaid questions be determined by this Court upon the granting of a Writ of Certiorari herein.

Respectfully submitted,

C. P. Von Herzen,

Attorney for Petitioners.

Certificate of Counsel.

I, the undersigned, C. P. Von Herzen, Counsel for Petitioner herein, hereby certify that in my judgment and opinion the foregoing Petition for a Writ of Certiorari is well founded, and that it is not interposed for purpose of delay.

C. P. Von Herzen.

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Respondents.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

Summary of Petitioners' Argument.

I.

The Federal Courts have jurisdiction of the subject matter of this action.

II.

The National Railroad Adjustment Board does not have exclusive jurisdiction of this controversy.

III.

In a proper case, a court of equity will intervene to protect seniority rights.

ARGUMENT.

I.

The Federal Courts Have Jurisdiction of the Subject Matter of This Action.

The case set forth in the complaint is one arising under a law regulating commerce, of which the Federal Courts are given jurisdiction. (28 U. S. C. A., Sec. 1337 (62 U. S. Stat. 931).) The allegations of the complaint show that plaintiffs, employees of an interstate carrier, have been discriminated against by their bargaining representative in violation of the provisions of the Railway Labor Act, 45 U. S. C. A., Sections 151 *et seq.* It shows that the representative has caused to be enacted a contract which destroys and infringes upon the rights of plaintiffs and other persons similarly situated and that certain employees have by such contract been placed in a better position in utter disregard of the rights of plaintiffs and other persons similarly situated.

In the case of *Tunstall v. Brotherhood of Locomotive Firemen and Engineers* (1944), 323 U. S. 210, 213, 89 L. Ed. 187, 193, the court said:

> "The duty imposed by the Railway Labor Act on the Brotherhood as bargaining representatives is a Federal right implied from the statute and the policy which it has adopted. It is the Federal statute which condemns as unlawful the Brotherhood's conduct. The extent and nature of the legal consequences of this condemnation, though left by the statute to judicial determination, are nevertheless to be derived from it and the Federal policy which it has adopted. (Citing cases.) *The case, therefore, is one arising under a law regulating commerce of which the Federal courts are given jurisdiction.*" (Emphasis added.)

The obligation of the bargaining representative elected pursuant to the terms of the Railway Labor Act is discussed at great length in the case of *Steele v. Louisville & Nashville Railroad Company, supra.* In that case, which involved the claim of a minority of Negro firemen that they had been discriminated against, the court stated at 323 U. S. 202, 89 L. Ed. 183:

> "While the majority of the craft chooses the bargaining representative, when chosen it represents, as the Act by its terms makes plain, the craft or class, and not the majority. The fair interpretation of the statutory language is that the *organization chosen to represent a craft is to represent all of its members, the majority as well as the minority, and it is to act for and not against those whom it represents.* It is a principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf, and that such a grant of power will not be deemed to dispense with all duty toward those for whom it is exercised unless so expressed. We think that the Railway Labor Act *imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates.* Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents, *cf. J. I. Case Co. v. National Labor Relations Board, supra* (321 U. S. 335, 88 L. Ed. 766, 64 S. Ct. 576), but it also has imposed on the representative a corresponding duty. We hold that the language of the Act

> to which we have referred, read in the light of the purposes of the Act, expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it sets, without hostile discrimination against them." (Emphasis added.)

Compare *Brotherhood of Railroad Trainmen v. Howard* (1952), 343 U. S. 768, 774, 96 L. Ed. 1283, 1289, where the court stated:

> "Bargaining agents who enjoy the advantages of the Railway Labor Act's provisions must execute their trust without lawless invasions of the rights of other workers. We agree with the Court of Appeals that the District Court had jurisdiction to protect these workers from the racial discrimination practiced against them."

Although it seems to appear clearly from the language above quoted, that the duty of the representative to refrain from discrimination applies to all minorities among the employees and not merely to racial minorities, *all the respondents contended that the Federal Courts had no jurisdiction unless it appeared that a racial discrimination was involved.*

It is true that the *Steele, Tunstall* and *Howard* cases, *supra,* were concerned with discrimination presented upon racial considerations. However, the basis of each of the decisions, as pointed out above, was that the statutory representative elected pursuant to the provisions of the

Railway Labor Act has the duty to represent all the employees and may not ignore the interests of a minority. That is to say, any contract which has the effect of depriving a minority of rights which have been obtained by the majority, must be based on grounds of reason and necessity or the interests of the minority cannot be thus circumvented.

The doctrine of the *Steele* case has in fact been used by the courts to protect minority groups of employees from discrimination not based on racial considerations. For example, in *Crowell v. Palmer* (1948), 134 Conn. 502, 59 A. 2d 729, the *Steele* case was relied upon as authority to prevent a union of carmen from arbitrary and discriminatory action in awarding double time pay only to its members and preventing non-union men from obtaining such double time pay. See also *Edwards v. Capitol Airlines* (1949 C. C. A., D. C.), 176 F. 2d 755, 760-761.

This court recently has also recognized that the *Steele* case does not pertain exclusively to racial discrimination, and in *Ford Motor Co. v. Huffman* (1953), 345 U. S. 330, 97 L. Ed. (Adv.) 598, the court states with regard to bargaining representatives:

> "Their statutory obligation to represent all members of an appropriate unit requires them to make an honest effort to serve the interests of all those members without hostility to any."

Petitioners urgently contend that the Brotherhood had no authority nor right to bargain for the denial of equal

employment and promotion opportunities for a portion of the employees represented merely because they were in a minority and could not help themselves.

The Brotherhood could not select one group of employees from those working on the property of the Pacific Electric and say that this group would have seniority rights within different crafts as well as "merged seniority," and select another group of employees, constituting a minority, and say that this group could not have the same rights as the other group even though all employees in both groups were working on the property at the same time. Such a distinction is no less invidious than discrimination based on race.

The Brotherhood has by this unconscionable agreement created a situation in which men with experience in a given craft, such as locomotive engineers who were employed during the late war as locomotive engineers, have found their rights to jobs as locomotive engineers diminish continuously during their employment. Thus, a man, who was able when he was first employed as a railroad engineer to hold a desirable daylight run, now finds that he does not have sufficient seniority some five or six years later to hold a job even as a fireman. To his dismay, he sees a man in the cab of the engine operating as a locomotive engineer, who received his training under him.

Furthermore, it is shown by the complaint that the discrimination thus perpetrated is in violation not only of ordinary standards of fair play, but is in direct con-

flict with the prohibitions and directions of the Constitution of the Brotherhood. The contract was an attempt not only to discriminate as against a minority of persons already employed but also an attempt to discriminate as against persons who might subsequently obtain employment. The preferred group would have among itself certain rights to seniority within crafts and districts but would deny such rights to a minority of persons presently employed on the property and also to all persons subsequently employed.

It is true that under some circumstances, for the benefit of the union as a whole, a bargaining representative may enter into an agreement which has the effect of destroying privileges previously enjoyed. However, when such an action is taken, it must be fair and must have a basis in logic and reason. It must not be an arbitrary exercise of power.[2]

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[2]For example, see *Ford Motor Co. v. Huffman, supra.* See also *Hartley v. Brotherhood of Railway Steamship Clerks* (1938), 283 Mich. 201, 277 N. W. 885, to which reference is made in the *Huffman* case. In the *Hartley* case, the court held that the union had the power to enter into an agreement whereby married women would be laid off before single women if the management found it necessary to curtail the number of its employees. The court held that the agreement was justified by economic conditions shown to exist but that, "a different situation might be presented had the agreement of 1932 been accomplished *as a result of bad faith, arbitrary action or fraud* directed at plaintiff on the part of those responsible for its execution." (Emphasis added.)

II.

The National Railroad Adjustment Board Does Not Have Exclusive Jurisdiction of This Controversy.

A. The Adjustment Board Has No Jurisdiction of a Portion of the Controversy. It Is Not Necessary to Present the Matter to the Board for Piecemeal Consideration.

Respondents have contended throughout this proceeding that the dispute set forth in the complaint was under the exclusive jurisdiction of the National Railroad Adjustment Board. The Court of Appeals was of the opinion that, at the least, the controversy must be first presented to the Board, and:

> "Until such procedure is invoked, plaintiffs have not and cannot show irreparable loss and inadequacy of the legal remedy warranting the interposition of of equity by the Court." [R. 69.]

The Court then states that it is clear that an individual employee may refer his grievance to the Board as a "party," and concludes:

> "There is thus vouchsafed a hearing before the agency designated by Congress and *upon which jurisdiction has been conferred by Congress* to also make findings and enter awards in all disputes *between carriers and their employees* growing out of grievances of the kind alleged in the complaint or out of the interpretation or application of agreements relative to working conditions, in which category in railway public service seniority is of course included." (Emphasis added.)

This statement overlooks the fact that the statute does not confer upon the Board complete jurisdiction to hear our controversy. The Board has no authority to hear

or determine controversies between employees and their bargaining representatives.

The case of *Slocum v. Del. etc.*, 339 U. S. 239, 240, 94 L. Ed. 795, 798, discusses the jurisdiction of the Board in the following language:

> "Section 3 of the Railway Labor Act confers jurisdiction on the National Railroad Adjustment Board to hold hearings, make findings and enter awards *in all disputes between carriers and their employees* 'growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules of working conditions . . .'" (Emphasis added.)

The lack of jurisdiction in the Board to determine a dispute between employees and their bargaining representative is clearly stated in *Steele v. Louisville & Nashville R. R. Co.*, 323 U. S. 192, 205, 89 L. Ed. 173, 185:

> "Section 3, First (i), which provides for reference to the Adjustment Board of 'disputes between an employee or group of employees, or a carrier or carriers, growing out of grievances or out of the interpretation or application of agreements' makes no reference to disputes between employees and their representative. *Even though the dispute between the railroad and the petitioner were to be heard by the Adjustment Board, that Board could not give the entire relief here sought.*" (Emphasis added.)

This pronouncement has been ignored by the Court of Appeals which indicates in its opinion that the Board has complete jurisdiction to hear all phases of the controversy.

The premise of the *Steele* decision is not confined to that case alone. It is inherent in the cases of *Brotherhood of Railroad Trainmen v. Howard* (1952), 343 U. S. 768, 96 L. Ed. 1283, and *Graham v. Brotherhood, etc.* (1949), 338 U. S. 232, 94 L. Ed. 22, in both of which it was held that employees having grievances against their employers and their bargaining representatives could present such grievances in the Federal Courts in the first instance.

The attention of the Court is directed to the case of *Crowell v. Palmer* (1948), 134 Conn. 502. In that action, certain carmen had sued their employer and their union, asserting that the union discriminated against them with regard to allocation of overtime employment. The defendants contended that plaintiffs had not exhausted their administrative remedies since the matter had not been carried through the machinery of the Railroad Adjustment Board. In this connection, the Court stated (134 Conn. at 509):

> "The plaintiffs attempted to do this, but were unable to secure a hearing. The Board ruled that its function was to handle disputes between an employee or employees and the carrier, not disputes between employees and a labor organization. Even though a dispute between the plaintiffs and the railroad would have been in itself within the jurisdiction of the Board, that would not avail to give the plaintiffs the relief they claim, because that result could be accomplished only by requiring the union to abide by the rule as to the making of the list of men to be called, and this fact takes the dispute out of the jurisdiction of the Board. Steele v. Louisville & Nashville R. Co., *supra,* 195."

The lack of jurisdiction of the Board in the respects above noted was called to the attention of both the trial court and the Court of Appeals, but the question was not answered in any respect.

B. Other Considerations Against Exclusive Jurisdiction in the Board.

The National Railroad Adjustment Board is located at Chicago, Illinois, and has no regional or branch offices. (45 U. S. C. A., Sec. 153, First (r).) [See R. 15.] The Board consists of 36 members, 18 of whom are selected by railroad carriers and 18 of whom are selected by labor organizations national in scope. (45 U. S. C. A., Sec. 153, First (a).)

The Board contains four divisions. The division having jurisdiction over disputes involving train and yard service employees and operating personnel of carriers is the First Division, consisting of 10 members, 5 of whom are selected by the carriers and 5 of whom are selected by national organizations of employees. (45 U. S. C. A., Sec. 153, First (h).)

It was alleged in the complaint filed in this action that the First Division of the Board,

> "has on its docket thousands of unresolved disputes; taking into consideration the progress made by the First Division of the Adjustment Board in recent years, these cases constitute from 5 to 6 years of work, with no allowance being made for cases which may be filed in the meanwhile. That even cases with priority rating require four years to be determined. That if the decision in the present controversy is delayed four years or more, it will be valueless when rendered." [Tr. 14, 15.]

If appellants are required to present their controversy to the Adjustment Board, in practical effect justice will be denied to them. Their dispute against the management and the union will be heard by representatives of the management and the union, who will be inclined to favor the organization or group which they represent. The plaintiffs will be required to engage counsel at Chicago, Illinois, whereas they are residents of Los Angeles County, California. Some of them will be required to travel to Chicago, and most of their business will of necessity be carried on by mail. They will wait at least four years before the hostile board lends an ear to their grievances.

Mr. Chief Justice Stone stated in the *Steele* case, *supra,* with regard to the propriety of referring a controversy of this character to the Board (323 U. S. at 206, 89 L. Ed. at 185):

> "Further, since Section 3, First (c) permits the national labor organizations chosen by the majority of the crafts to prescribe the rules under which the labor members of the Adjustment Board shall be selected and to 'select such members and designate the division on which each member shall serve,' the Negro fireman *would be required to appear before a group which is in large part chosen by the respondents against whom their real complaint is made.*" (Emphasis added.)

C. The Distinction Between the Steele and Slocum Cases.

It was decided by this Court in the case of *Slocum v. Delaware etc. Railway, supra,* that a dispute concerning the interpretation of an existing collective bargaining agreement was exclusively within the jurisdiction of the Adjustment Board. That case involved an attempt by

a railway to obtain a declaratory judgment with regard to the question as to which of two unions was entitled to handle certain jobs on its property. Although the Court concluded that jurisdiction of the Board was exclusive, its decision in this respect was qualified by a footnote stating (339 U. S. at 244, 94 L. Ed. at 800):

> "We are not confronted here with any disagreement or conflict of interest between an employee and his bargaining representative, as in Steele v. Louisville and N. R. Co., 323 U. S. 192, 89 L. Ed. 173."

Apparently by this decision, the Supreme Court meant to make distinction between actions in which it was merely sought to interpret a contract between a railway and the bargaining representative and cases in which it was contended that the contract or portions thereof *were invalid and not enforceable.*

The situation also appears to be clarified by the more recent pronouncement of the Supreme Court in the *Howard* case, *supra,* 343 U. S. 774, 996 L. Ed. 1289:

> "Here as in the Steele case, colored workers must look to a judicial remedy to prevent the sacrifice or obliteration of their rights under the Act. For no adequate administrative remedy can be afforded by the National Railway Adjustment or Mediation Board. The claims here cannot be resolved by interpretation of a bargaining agreement so as to give jurisdiction to the Adjustment Board under our holding in Slocum v. Delaware L. & W. R. Co., 339 U. S. 239, 94 L. Ed. 795, 90 S. Ct. 577. *This dispute involves the validity of the contract, not its meaning."* (Emphasis added.)

D. Unreviewable Discretion of Privately Selected Board.

It should also be pointed out that awards made by the Adjustment Board are not subject to review in the courts except insofar as they may contain a money award In all other respects such awards are final and binding. (45 U. S. C. A., Sec. 153, sub. 1(m); *New Orleans Public Belt Railway, etc. v. Ward* (1950, C. C. A. 5), 182 F. 2d 654.)

If an award requires interpretation, the interpretation is to be given by the division of the board which has rendered the award and not by the courts. The act permits suit on the award by the person for whose benefit it was made, but the law contains no provision for suit by a carrier or person aggrieved by an award to construe, interpret or set it aside. (45 U. S. C. A., Sec. 153, sub. 1(p); *New Orleans Public Belt Railway v. Ward, supra.*)

In the event an erroneous award is made, there is no provision of any kind whereby such an award may be set aside by other proceedings.

The dilemma in which a minority might find itself is pointed up by the decision of *Michael v. Louisville & Nashville Railway* (1951, C. C. A. 5), 188 F. 2d 224. In that case, an employee who claimed to have been wrongfully discharged presented his grievance to the Adjustment Board. He was dissatisfied with an adverse ruling by the Board and brought action in the Federal Court. The Court held that, having presented the matter to the Adjustment Board, the plaintiff had elected his remedy and could not present the matter in court. The Court stated that the employee's decision to go before the Board was voluntary, and he was bound thereby.

Thus it seems that if petitioners were required to present their grievance to the Adjustment Board, composed of persons selected by the defendants or persons sympathetic to the defendants, they would have no appeal from an award against them and would be precluded from presenting an independent action in Court because they would be regarded as having elected their remedy by voluntarily submitting the matter to the Board. The result would be a complete relegation of the function of the court to a hostile administrative tribunal and an abrogation of the fundamental concept that a person is entitled to his day in court.

III.

In a Proper Case, a Court of Equity Will Intervene to Protect Seniority Rights.

In its opinion, the Court of Appeals states [R. 73]:

> "We think appellants fail to appreciate the essential difference between the suit laid in the complaint and cases wherein collective bargaining agreements containing invidious proscriptive factors that are inimical to statutory or constitutional right, such as racial discriminations are presented to the Court."

Does the Court mean that although a man has been working at a particular job along with other employees, enjoying certain rights and privileges under an existing agreement, the majority may enact an agreement providing that he shall not longer enjoy the rights he once had, and provide that employees who had been working with him could, under the new agreement exercise rights against him which they previously did not have?

Is the Court thus sanctioning a system whereby a man who has acquired a definite date of qualification, let us say August 30, 1941, as a locomotive engineer, can be replaced by a man who qualified as a locomotive engineer on September 1, 1941, and who, during the period from September 1, 1941 to December 22, 1942, could not have replaced him because the latter individual had been an employee of the company in some other capacity prior to August 6, 1941?

It would appear that defendants should at least be required to explain why such a provision is reasonable and that in the first instance it should be regarded as lacking in good faith.

As a correlative proposition, the Court of Appeals states [R. 70-71]:

> "Here, however, except as to the latitudinal claim amounting to no more than a conclusion of law that the contractual differential relative to appellants' seniority in the P. E. is 'arbitrary, capricious and fraudulent,' there is no showing that the statutory representative of the craft to which appellants belonged when the questioned contract was made did not in good faith effectuate the change in working conditions as of August 6, 1941 so as to bring the matter complained of within pronouncements of the Supreme Court in decisions under the Railway Labor Act and the principles and concomitants of collective bargaining as provided and infused therein."

It is respectfully submitted that the complaint states far more than a bald assertion that the statutory representative has not acted in good faith.

The complaint states unequivocally that before December 22, 1942, when the agreement complained of was enacted, seniority rights on the property of the defendant Pacific Electric were confined to districts and to the craft and class in which the Trainmen worked. That is to say that employees obtained what is commonly referred to as a "date of qualification" within a district. The complaint showed that it is a standard rule on all railroads in the United States that seniority is based on the date of qualification concept [Tr. 7, 9]. The complaint alleged that the constitution of the Brotherhood provided that, "a standard rule will not be altered or amended without permission of the president of the Brotherhood" and that such permission or authorization was never obtained [Tr. 11].

It was further alleged that the Brotherhood's constitution provided that, "a definite and defined line of demarcation be maintained between yard and road service." and that no agreement changing home and other terminals in pool or assigned freight or passenger service be negotiated without first obtaining the consent of a majority of members holding seniority rights on any division affected, by referendum vote. The line of demarcation required has not been maintained by the agreement complained of and the referendum was not obtained [Tr. 10, 11].

These violations of the constitution of the Brotherhood are not mentioned in the opinion.

It is respectfully submitted that the allegations referred to, taken together with the allegations that the agreement was enacted arbitrarily, capriciously and fraudulently, stated far more than a mere conclusion. In fact, the use

of these words in Paragraph XVII of the complaint is apt and appropriate [Tr. 10.]

How better could it be stated that those individuals who were employed on the carrier between the 6th day of August, 1941, and the 22nd day of December, 1942, when the agreement was made *retroactive,* had been unfairly deprived of their rights?

The fallacy, to our way of thinking, of the decision of the Court of Appeals perhaps stems from its concept of seniority [R. 73]:

> "Seniority among railway workers is fundamentally and wholly contractual and does not arise from mere employment and is not an inherent, natural or constitutional right."

It is true that seniority rights have their origin in collective bargaining agreements, but this does not mean that because such rights would not have existed had it not been for the contract, the bargaining agent has no responsibility to the persons on whose behalf it purportedly acts, so long as they are in the minority.[3]

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[3]There have been numerous decisions throughout the United States indicating that once seniority rights have been created, they cannot be arbitrarily destroyed.

Grand International Brotherhood of Locomotive Engineers v. Mills (1934), 43 Ariz. 379, 31 P. 2d 971, 979-980;

Evans v. Louisville & Nashville Railroad Co. (1940), 191 Ga. 395, 12 S. E. 2d 611;

Crisler v. Crum (1927), 115 Neb. 375, 213 N. W. 366;

Dooley v. Lehigh Valley, etc. (1941), 130 N. J. Eq. 75, 21 A. 2d 335;

Piercy v. Louisville & Nashville Railroad Co. (1923), 198 Ky. 477, 248 S. W. 1042, 33 A. L. R. 322.

In the instant case, must not the local representatives of the union be required to show why it was reasonable for them to ignore apparently mandatory provisions of the constitution of their organization? Should they not be required to show why it is reasonable for them to set up an agreement under which some men have the so-called "date of qualification" and other men do not? Should they not at least show why it is reasonable for them to enact an agreement which destroys such rights of qualification already enjoyed by some individuals and in effect giving such rights to others?

Conclusion.

Petitioners respectfully submit that their petition for a Writ of Certiorari should be granted and the judgment of the Court of Appeals should be reversed with directions to remand to the District Court for a hearing of this cause on the merits.

Respectfully submitted,

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